YAP MOI

v.

HONG LEONG BANK BHD

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[CIVIL SUIT NO: 22-584-1998]
10 AUGUST 1999

CIVIL PROCEDURE: *Summary judgment - Appeal - Plaintiff's claim for conversion of cheques - Whether there were triable issues - Whether affidavit in support of summary judgment defective - Whether summary judgment should have been granted*

CIVIL PROCEDURE: *Affidavits - Defective affidavit in application for summary judgment - Failure of plaintiff to apply for leave of court - Rules of the High Court 1980, O. 14 rr. 4 and 7(1) - Whether affidavit could be used to support application for summary judgment*

This was the defendant bank's appeal against the decision of the senior assistant registrar allowing the plaintiff's application for summary judgment.

The plaintiff was the payee of eight crossed cheques ('the said cheques') issued by JB Securities which were not negotiable. The plaintiff alleged that the defendant bank was liable for conversion and/or negligent of the said cheques as they were paid into the account of a third party in the defendant bank ('defendant').

The defendant claimed: (i) that the said cheques were negotiable or transferable in law at the time they were paid, *ie*, before the pre-amendment to the Bills of Exchange Act 1949; (ii) that the defendant was protected by s. 85 of the said Act, and that this defence could only be taken away if the defendant acted in bad faith and was negligent which could only be determined at a full trial; (iii) that the said cheques were banked into the account of the said third party upon the instruction of the plaintiff's son-in-law who operated the plaintiff's affairs in relation to JB Securities; (iv) that the plaintiff's claim filed on the eve of the limitation period was an issue that should go for trial; and (v) that the *bona fide* of the plaintiff was an issue as she had waited for so long to file the claim added to the fact that she was also not the client of the defendant.

The plaintiff claimed that there were no triable issues and submitted, amongst others: (i) that the defendant did not obtain the plaintiff's consent to pay the cheque proceeds to the third party; (ii) that there was no document to show

that the defendant was given the necessary authority to bank in the said cheques into the account of the 3rd party; and (iii) that the burden was on the defendant to disprove negligence.

Held:

[1] Summary judgment is a procedural devise available for prompt and expeditious disposition of an action by the plaintiff when there is no dispute as to facts or law. This is to enable the plaintiff to obtain an early judgement in cases where the defendant has no hope of success and the defence raised will merely have the effect of delaying judgment.

[2] Where all issues are clear and the matter of substance can be decided once and for all without going for trial, there is no reason why the court hearing the application for summary judgment should not deal with the whole matter under O. 14 RHC.

[3] There appeared to be a plenitude of triable issues in this case. It was obvious that there were disputes which were not straight forward. Also, there were no clear issues that entitled the plaintiff to judgment. Thus, the defendant had raised triable issues which could only be properly determined at a trial where evidence would be required to be adduced.

[4] In the event the above finding was wrong, the plaintiff's affidavit in support of the summary judgement application was defective as it had no jurat at all. This irregular affidavit could not be taken to support the plaintiff's application for summary judgement unless leave of the court was applied for under O. 14 rr. 4 and 7(1) RHC. No such leave was applied before this court. It followed that the summary judgment application under O. 14 r. 1 failed to comply with the stringent requirement of O. 14 r. 2(1), the end result being that there was no application for summary judgment under O. 14 RHC before this court.

[5] The fact that the defendant had deposited the entire judgment sum in the court was also taken into account.

[Appeal allowed.]

Case(s) referred to:

Algemene Bank Nederland NV v. Happy Valley Restaurant Pte Ltd [1991] 2 MLJ 289 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Jones v. Stone [1894] AC 122 ***(refd)***

Jacobs v. Booth Distillery Co [1901] 85 LT 262 ***(refd)***

Malayan Insurance (M) Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank [1995] 1 CLJ 609 ***(refd)***

Proven Development Sdn Bhd v. Hongkong And Shanghai Banking Corporation [1998] 5 CLJ 644 ***(refd)***
Rubber Industry Board v. Hongkong And Shanghai Banking Corporation [1957] 23 MLJ 103 ***(refd)***
Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah [1995] 3 CLJ 610 ***(refd)***
UMBC v. Kek Tek Huat & Ors [1990] 1 MLJ 83 ***(refd)***
Woodland Development S/B v. Chartered Bank & Anor [1986] 1 MLJ 84 ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 81A, 85(3)
Rules of the High Court 1980, O. 14 rr. 1, 2(1), 4, 7(1)

Other source(s) referred to:
Law of Banking, Poh Chu Chai, p 446

For the plaintiff - Gan Techiong; M/s Gan & Lim
For the defendant - Lim Kian Leong; M/s Lim Kian Leong & Co

Reported by Usha Thiagarajah

JUDGMENT

Sulong Matjeraie JC:

The summon-in-chambers – encl. 7 was before the learned senior assistant registrar for an application by the plaintiff for summary judgment.

This was supported by an affidavit of Yap Moi, affirmed on 24 September 1998 at encl. (6) where it was alleged that she was the payee of eight Malayan Banking Bhd cheques issued by JB Securities worth RM1,632,300.92 ("the said cheques"). The said cheques dated from 17 September 1992 to 15 December 1993 were all crossed cheques marked "Not Negotiable A/C payee only" and the respective endorsements "or bearer" were cancelled.

Despite that the defendant had wrongfully received the said cheques and allegedly obtained payments.

On the alternative, plaintiff is claiming for damages caused to her due to conversion of the said cheques by the defendant and or due to negligence of the defendant in paying monies to the defendant's customers. She suffered losses amounting to RM1,632,300.92 plus interest since 17 December 1993.

The plaintiff therefore prays for judgment in terms of her application.

This court will comment further on the supporting affidavit later in this judgment.

The learned senior assistant registrar (SAR) on 3 May 1999 allowed the plaintiffs application for summary judgment.

The defendant is appealing against the said decision of the learned SAR. Hence this appeal at encl. 31.

In reply to the plaintiffs affidavit, the appellant/defendant filed affidavits deposed by the following:

1. Affidavit of Mr. Ng Hong Chai, ("Mr. NG") who, at the material time, was a remisier attached to JB Securities Sdn. Bhd, at encl. (9). This affidavit was affirmed on 12 October 1998.
2. Affidavit of Mr. Lee Wah Cheong ("Mr. Lee"), who, at the material time, was the current account officer in charge of Mr. Ng Hong Chai's account at encl. (10). Mr. Lee has however left the employment of the defendant on 2 July 1996.
3. Affidavit of Encik Hazimi Bin Kassim, the head of the defendant's internal audit division at encl. (12). He was also involved in investigating the claim made by the plaintiff.

Appellant's / Defendant's Contention

The plaintiff is the payee of the said cheques which were paid in personally to the defendant's bank by Mr. Ng Hong Chai and credited into his account despite the fact that the said cheques were crossed and marked " not negotiable A/C only" and the respective endorsement "or bearer" duly cancelled.

The plaintiff's claim said the cheques were not negotiable and as such it was alleged that the defendant was liable for conversion and / or negligent.

The defendant's contention was that at the time when the said cheques were paid in the years of 1992 and 1993, despite the endorsement, the said cheques were, in law, negotiable or transferable.

The Bills of Exchange Act 1949 was amended in 1998 with the additional provision of s. 81A on "Non- transferable cheque". Date of coming into force of this provision was sometime in 1998, very much later than the time when the said cheques were paid in to the defendant's bank.

The defendant also submitted that s. 85 Bills of Exchange Act ("the Act") protects a banker when he collects an instrument for a customer in which the customer has no title or a defective title. One of the objects of s. 85 is to relieve a banker from the burden of having to examine the indorsements on

instruments presented for collection. A banker is therefore not to be treated as negligent by reason of his failure to check the indorsements on an instrument presented for collection.

Section 85(3) of the Act narrows the definition of negligence. It was submitted that the defendant is entitled to a statutory defence under s. 85 and this defence can only be taken away if the defendant acted in bad faith and negligent which can only be determined at a full trial.

The defendant also quoted a passage appearing at p. 446 of the book entitled *"Law of Banking"* (2nd edn,) by Poh Chu Chai which reads thus:

> A banker who is being sued in conversion has very few defences available to him at common law. His only refuge lies in the statutory protection accorded under section 85 of the Bills of Exchange Act. Section 85 protects a banker when he collects a cheque for a customer. In order to claim protection of Section 85, a collecting banker has to show that he acted in good faith and without negligence. An act is done in good faith within the meaning of the Bills of Exchange Act if it is done honestly, whether it is done negligently or not. In view of the further requirement under Section 85 that the Banker must have acted without negligence, the banker must therefore show that in collecting the cheque he had acted honestly and without negligence. In practice, the honesty of a banker collecting a cheque is seldom in doubt.

The defendant further submits that ...

> A collecting banker, apart from his own customer owes no duty of care either in contract or in tort to anyone else. It follows that negligence *per se* in collecting a cheque does not give a third party a cause of action against a collecting banker. The question of negligence is only relevant when a collecting banker is seeking protection under s. 85. This is because the absence of negligence in collecting a cheque has been made a pre condition to the protection accorded under s. 85. The negligence referred to under s. 85 is negligence in the receipt of payment and not any isolated act of negligence. The duty of care which a collecting banker has to exercise is therefore a duty imposed by statute. When a third party is suing a collecting banker in conversion, the banker is entitled to rely on the contributory negligence of the third party.

Paragraph 8 of Mr. Lee Wah Cheong affidavit, encl. (10) says that in his experience as a banker in Johor Bahru for over 18 years he knew that in Johor it is quite a **common practice** for account payee cheque to be paid into 3rd party accounts as **part of normal business transactions so long as all parties are aware of this procedure**. Mr. Lee therefore did not think it to be unusual for the plaintiff's cheques to be banked into Mr. Ng Hong Chai's ("Mr. Ng") account as in his dealings with Mr. Kee Gek Hang ("Mr. Kee") the son-in-law of the plaintiff, and Mr. Ng that Mr. Kee was authorised to deal with

the plaintiff's affairs in relation to JB Securities, in checking, collection and payment of cheques and that Mr. Kee **was the beneficial owner of the cheques**.

It is also the belief of Mr. Lee that the plaintiff was not entitled to claim any money from the defendant as the plaintiff has already been repaid, see para. 10 of Mr. Lee's affidavit encl. (10).

Mr. Lee in his affidavit (encl. 10) para. 4 said he knew the close business relationship between Mr. Kee and Mr. Ng and that he knew of and believed that from his dealings with them, Mr. Kee was authorised by the plaintiff to operate her share accounts and matters connected with share trading as this was often mentioned in his presence, see para. 4 of encl. 10.

The defendant / appellant further argued that two separate issues which require trial proper and these are raised in the affidavits:

(1) Mr. Ng Hong Chai at encl. (9) alleged that the account of the plaintiff was operated by her son-in-law, Mr. Kee whom Mr. Ng believed was authorised to deal with the plaintiff's account. From the outset, every transaction which Mr. Ng handled for the plaintiff's account **was based on instructions from Mr. Kee who collected and paid cheques on behalf of the plaintiff**.

It was also alleged that when JB securities issued a cheque payable to the plaintiff these cheques **were collected by Mr. Kee and given to Mr. Ng to be put in Mr. Ng's account**.

(2) Mr. Ng has affirmed at para. 21 of his affidavit encl. (9) that Mr. Kee through the plaintiff has been paid the full sum of RM1,632,300.92 and para. (19) encl. 9 shows the list of cheques issued by him to repay Mr. Kee amounting to RM2,060,493.17.

Other matters raised by the defendant are as follows:

(a) this action was taken just before the six years limitation period.

The case of *Proven Development Sdn Bhd v. Hongkong And Shanghai Banking Corporation* [1998] 5 CLJ 644; [1998] 6 MLJ 150, was quoted.

If the plaintiff has incurred a loss of RM1.6 million in 1992 it is rather improbable, argued the defendant, that they only file a claim on the eve of limitation period. This alleged the defendant, is an issue that should go to a trial.

(b) The case of *Proven Development (supra)* is also an authority that it is incumbent upon the company to inform the bank of any irregularity in the company's account as soon as the company becomes aware of it.

The question posed was why did the plaintiff wait for six years. Further, she was **not** the client of the defendant.

The *bona fide* of plaintiff's claim is in issue.

Defendant also alleged that the learned SAR'S decision relied on *Rubber Industry Board v. Hong Kong And Shanghai Banking Corporation* [1957] 23 MLJ 103 a case which was decided after a full trial where the learned judge had the benefit of hearing the witnesses.

Some emphasis had also been given on hearsay evidence on affidavit. It was decided in *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610; [1995] 2 AMR 1751 where the learned Low Hop Bing, JC (as his Lordship was then) that the rule against hearsay evidence, does not apply to affidavit evidence: (O. 14 r. 2) RHC.

Plaintiff's / Respondent's Contention

It was contended by the plaintiff that the defendant's appeal ought to be dismissed with costs as there is no triable issue.

The authority for O. 14 RHC is the case of *Bank Negara v. Mohd Ismail* [1992] 1 CLJ 627; [1992] 1 MLJ 400 Supreme Court: Majority decision.

It was held that:

(a) in an O. 14 application, the court has to be satisfied that the defence not only raised an issue but that the issue is triable which depends on the facts disclosed;

(b) the judge has a duty to reject assertion or denial;

(c) where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed the court should exercise duty under O. 14.

The undisputed facts are as follows:

1. The plaintiff was named as payee in the cheques issued by JB Securities Sdn Bhd;

2. Cheques were all crossed and marked "A/C payee only" and "not negotiable".

3. Endorsement "or Bearer" on all the cheques were cancelled;

4. Defendant received payment for the plaintiff's cheques and paid the proceeds to a third party.

5. No document to support the bare allegation that the plaintiff authorised the payment to the third party.

It was submitted by the plaintiff that:

(a) The defendant did not obtain the plaintiff's consent to pay the cheque proceeds to the third party.

(b) The defendant failed to produce a single document from the plaintiff or Mr. Kee Gek Hang which gave the necessary authority to the defendant.

(c) The defendant's affidavit (that of Encik Hazimi Kassim (encl. 16)) paras. (3) and (5) dated 11 November 1998 were alleged to have contradicted para. 8 of encl. 12 in respect of the person paying the plaintiff back.

(d) Burden is on the defendant to disprove negligence.

(e) If it was true, why did the defendant fail to say that the cheques had been paid to the plaintiff: but only through the plaintiff's account.

(f) Paragraph 6 of encl. 10 – affidavit of Lee Wah Cheong is an attempt to confuse.

The above are contradictions as alleged by the plaintiff. See: *Woodland Development S/B v. Chartered Bank & Anor* [1986] 1 MLJ 84, where it was held that as the plaintiff were the payees of the three cheques with endorsement of A/C payee, the defendant bank was negligent in collecting cheques for the third party and were liable for conversion or alternatively for money had and received.

It was submitted that the principle of this case applies to this instant case. The reason why banks do not accept third party cheque was because the proceeds therein belonged to the payees therein.

The payee is the true owner of the cheque ..." a bank is liable to the true owner if it collects a cheque with a forged indorsement, or to which the customer has no title, and if it fails to prove that it had acted without negligence. Failure to prove that it had acted without negligence" would mean that s. 85 of the Bills of Exchange Act will not afford any protection.

Another case quoted was:

UMBC v. Kek Tek Huat & Ors [1990] 1 MLJ 83 which the plaintiff claimed that the facts are almost similar to this instant case.

"Not negotiable" should, as alleged by the plaintiff, be given its ordinary meaning.

Plaintiff also quoted the *Rubber Industry's* case – [1957] 23 MLJ 103 where it was decided that as the bank has not discharged the onus, it was liable to the plaintiff for damages for conversion of the cheque.

Plaintiff said the case of *Algemene Bank Nederland Nv v. Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289 is not binding.

On *Proven Development Sdn Bhd v. Hong Kong And Shanghai Banking Corporation (supra)* the facts are completely different.

It was further submitted that it was not equitable to keep the plaintiff from the judgment sum. Defendant could be held liable for money had and received. Alternatively for conversion of the cheques where the plaintiff is the payee. The defendant must be liable because the affidavits failed, in the eyes of the plaintiff, to disprove negligence under s. 85 of Bills of Exchange Act.

The Law On Summary Judgment

Summary judgment is a procedural devise available for prompt and expeditious disposition of an action by the plaintiff when **there is no dispute** as to facts or law.

The object of O. 14 procedure is to enable the plaintiff to obtain an early judgment in cases where the defendant has no hope of success and any defence he raises will merely have the effect of delaying judgment, see: *Jones v. Stone* [1894] AC 122.

In *Jacobs v. Booth Distillery Co* [1901] 85 LT 262 Halsbury LC observed:

> People do not seem to understand that the effect of O. 14 is that, upon the allegation of the one side, a man is not permitted to defend himself in court; that his rights are not litigated at all. There are something too plain for argument; and when there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things, and to prevent sham defences, from defeating the right of parties by delay, and at the same time causing great loss to the plaintiff who are, endeavouring to enforce their rights.

There has been a long line of authorities for the proposition that where **all issues are clear** and the matter of substance can be decided once and for all without going to trial, there is no reason why the court hearing the application

for summary judgment should not deal with the whole matter under the procedure in O. 14 application, per His Majesty Raja Azlan Shah (CJ Malaya as His Majesty was then) in: *Citibank Na v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 at p. 284.

Hashim Yeop A Sani, SCJ (as his Lordship was then) in *Malayan Insurance (M) Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 and p. 185 said:

> The underlying philosophy in O. 14 provision is to prevent a Plaintiff entitled to the money from being delayed his judgment where there is **no fairly arguable defence** to the claim. The provision **should only** be applied to cases where there **is no reasonable doubt that the Plaintiff is entitled to judgment**. O. 14 is not intended to shut out a defendant. The jurisdiction should **only be exercised in very clear cases**.

This is because "the effect of O. 14 is to shut the defendant from having his day in the witness box. **It is a very special jurisdiction and is only invoked in cases where there is no *bona fide* triable issue**" per Justice Gopal Sri Ram HMR, in *Ng Hee Thoong & Anor v. Public Bank* [1995] 1 CLJ 609; [1995] 1 MLJ 281 at p. 287. (emphasis added)

Applying the above propositions of law there appear to be a plenitude of triable issues in this case. *Inter alia*, clearly there is a dispute on factual issue like the account opening form at exh. NHC 1 of encl. 9.

It is also in dispute whether Mr Kee Gek Hang, did give instruction to Mr Hong Chai on the transactions handled by the latter on behalf of the plaintiff.

Further, the parties appear to be unable to agree as to whether the alleged amount of RM1,632,300.92 has been paid for in full by Mr. Ng to Mr. Kee through the plaintiff.

It was also alleged by Mr. Ng Hong Chai that an amount of RM2,060,493.17 has been paid to Mr. Kee Gek Hang.

It is obvious to this court that these are disputes which are not straight forward and clear issues where there is "no reasonable doubt that the plaintiff is entitled to judgement." As stated earlier, O. 14 procedure should only be exercised in very clear cases.

It is therefore the finding of this court that after reading all the affidavits filed herein and after hearing the submissions of both counsel, that the defendant has raised triable issues. The defendant's defence was not a sham defence. Bearing in mind, the principles as outlined in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 MLJ 400 this instant case is not a plain and straight forward case in which summary judgment under O. 14 of

the Rules of High Court could be granted. There are issues of facts and law which could properly be determined at a trial where evidence would be required to be adduced.

In the event that the finding of this court as hereinbefore stated is wrong, it is felt proper to also highlight the contention as outlined in para. 4 of the affidavit of Mr. Ng Hong Chai at encl. 9 where it was deposed that from the knowledge gained from meeting the plaintiff that the plaintiff is illiterate and cannot read or write Bahasa Malaysia or English. Whilst the "Afidavit jawapan plaintiff" affirmed on 28 October 1998 by the plaintiff and filed herein on the same day contained the proper jurat, the affidavit at encl. (6) supporting the summon-in-chambers at encl (7) praying for summary judgment has no jurat at all. The affidavit is defective in view of the irregularity mentioned earlier.

Therefore the irregular affidavit could not be taken to support the plaintiff's application for summary judgment unless leave was applied for under O. 41 rr. 4 and 7(1) of the Rules of High Court. No such leave has been applied before this court.

The effect of this irregularity is obvious. Such application under O. 14 r. 1 failed to comply to the stringent requirement of O. 14 r. 2(1). The end result is that there is no application for summary judgment under O. 14 RHC before this court.

One final point to mention here is that in the course of his submission, learned counsel for the appellant/defendant has agreed to deposit the entire judgment sum amounting to RM2,348,187.85 in the court. This amount has in fact been deposited in the court.

In the circumstances this court will allow the appeal of the defendant at encl. (31) and conditional leave to defend on condition that the money amounting to RM2,348,187.85 shall be kept in court until the outcome of the trial or until further order. Costs to be taxed and payable by the respondent/plaintiff to the appellant/defendant.

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